

**BUREAU OF INDIAN AFFAIRS
LIABILITY INSURANCE STUDY
EXECUTIVE SUMMARY**

Introduction

Congress, under Public Law 101-121 (Act), temporarily expanded the definition of federal employees to include tribes and tribal contractors. This action provided BIA-funded tribal organizations with liability insurance coverage under the Federal Tort Claims Act (FTCA) for self-determination programs funded under Public Law 93-638.

The Act also directed the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) to study the implications of providing liability insurance for tribes, on behalf of the respective Secretaries, and provide a report to the Committee on Appropriations of the United States Congress. The report was to outline options both for the provision of insurance and the projected cost thereof.

As a result of the above-described legislation, the Bureau of Indian Affairs engaged Foxx & Company and its two subcontractors, R. Navarro and Associates, San Diego, CA; and Joseph Eve & Company, Great Falls, MT; to conduct a study of liability insurance coverage at Indian organizations and to report the results of the study to BIA.

Results of Study

The results of the study, by objective, are as follows:

B. Evaluate the cost effectiveness of the present methods of providing liability insurance as:

1. Direct cost to contracts and grants
2. Inclusion in the indirect cost proposal

The direct purchase of general liability insurance and the inclusion of the cost in the indirect cost pool appears to be the most cost-effective method of purchasing insurance and recovering the cost. There were a number of organizations that charged insurance costs directly to programs under less than precise methods. The accurate direct charging of liability insurance to contracts and grants is very difficult, because general liability insurance coverage traditionally relates to an entire organization, not a specific grant or contract. Findings of this study revealed that there was at least one organization that paid for liability insurance out of tribal funds. This method resulted in no charge to BIA or IHS.

C. Evaluate the cost effectiveness of providing liability coverage for tribal contract/grant activities on a risk-management, self-insured basis.

Risk management/self insurance is a cost-effective method of providing liability insurance. However, it is the opinion of our insurance experts that premium payments in excess of \$500,000 are necessary before self insurance is effective. Risk management is also an integral part of self-insurance and must be a permanent part of an organization's management philosophy. None of the entities visited had a self-insurance program. (The Navajo Nation has a self-insurance program but it declined to participate in the study.)

A. Development of a central database of liability exposure and losses unique to Indian contractors and grantees.

A central database of liability exposure and losses common to Indian contractors/ grantees was developed for those organizations visited and entities responding to the mail-in questionnaire. The database excludes the Navajo Nation which declined to be part of the study. The database includes information from approximately 75 tribes and tribal organizations which received the following amounts of funding from BIA and the Indian Health Service:

Funding	\$126,033,750
Staff	2,753
Vehicles	2,244
Cost of Insurance	\$ 2,578,801
General Liability	\$ 1,081,154
Auto Liability	\$ 1,254,287
Special Liability	\$ 243,360

The study did not reveal any insurance liability exposures unique to Indian organizations. However, two of the organizations studied were exposed to injuries which occur in the performance of horse shows and/or rodeos. We were unable to establish a central database of liability losses that were covered by private insurance carriers. The loss data we did obtain related to only 12 of the 50 sites visited. We were also unable to gather any information relative to liability insurance losses covered by the FTCA and tracked by the General Accounting Office. This task could not be performed due to the lack of claims at the sites visited, the unavailability of claims information, and the General Accounting Office's inability or unwillingness to provide data on FTCA claims. In addition, we were unable to determine the losses covered by insurance carriers that related solely to Public Law 93-638 activities because most Indian organizations included in the study did not separate insurance coverage between Public Law 93-638-funded programs and other programs.

D. Evaluate the cost effectiveness for continuing coverage under Federal Tort Claims Act, including a statement of cost differences between FTCA and:

- a. Direct purchase of insurance
- b. Risk management and self insurance

We cannot evaluate the cost effectiveness of continuing coverage under FTCA because the cost required to administer FTCA was not available. We were unable to obtain information on the cost to administer FTCA from the Justice Department, the federal organization responsible for defending claims, or the General Accounting Office, the federal organization charged with the responsibility of tracking FTCA activity.

In addition, we cannot determine the cost differences between the direct purchase of insurance and self insurance/risk management because none of the sites visited had a self-insurance program. However, under the current circumstances, we believe that direct purchase is more cost effective than self insurance.

E. Conduct an actuarial study based on the actual loss history of grantees/contractors.

An actuarial study based on the actual loss history of grantees/contractors could not be performed because sufficient claim information was not available at the sites visited, from the insurance agent, or the mail in responses. Also, the loss history for FTCA that was to be maintained by the General Accounting Office was not made available. In addition, the tribes and tribal organizations that participated in the study did not have liability insurance claims separated by Public Law 93-638 activities and other programs. Furthermore, the Navajo Nation, which receives approximately 20 percent of Public Law 93-638 funding, declined to participate in the study. Therefore, an actuarial study was not performed.

F. Perform a cost benefit and policy analysis of pooling and loss prevention compared with the purchase of traditional liability insurance.

Pooling, as compared to the traditional purchase of liability insurance, could be a more cost-effective method of obtaining liability insurance. However, pooling will only be practical when certain conditions are met.

G. Prepare a five-year funding plan for providing liability insurance.

The information needed to develop a five-year funding plan for liability insurance to insure Public Law 93-638 funded programs was not available at the sites visited. Liability insurance was purchased on the basis of organization-wide requirements, not on specific program requirements such as the Public Law 93-638 funded programs. Also, many of the organizations chose not to participate in the study; therefore, a valid sample of organizations receiving Public Law 93-638 funding could not be selected. In addition, the Navajo Nation, which receives approximately 20 percent of the Public Law 93-638 funding, declined to participate in the study. Finally, the true impact of the FTCA on the cost of liability insurance could not be assessed because most organizations participating in the study did not consider FTCA coverage when purchasing liability insurance. Accordingly, a valid five-year funding plan for liability insurance coverage for Public Law 93-638 funded activities could not be prepared.

Conclusions and Recommendations

Based on our study, it appears that all tribes and tribal organizations have some type of liability coverage and that the coverage is adequate based on the claims filed. However, Indian organizations were not adequately notified of the FTCA coverage. As a result, the FTCA coverage established by Public Law 101-121 and permanently extended by Public Law 101-512 had very little affect on the purchase of liability insurance by Indian organizations. The primary reason for the lack of knowledge of FTCA coverage is that BIA did not adequately inform the Public Law 93-638 contractors/grantees of the coverage provided by FTCA.

If BIA determines that it needs to continue coverage under FTCA, we recommend the following:

- (1) Obtain a clear delineation of FTCA coverage; what is covered, what is not; from the Justice Department.
- (2) Advise all Public Law 93-638 grantees/contractors of the actual coverage afforded by FTCA and inform them what coverage should be obtained through commercial carriers to supplement FTCA coverage.
- (3) Perform an indepth study of insurance activities at several small, medium, and large Public Law 93-638 grantees/contractors to determine:
 - Type of coverage
 - Amounts of coverage
 - Typical activities being covered by insurance
- (4) Tailor liability insurance coverage for the above three types of entities and develop a prototype liability insurance policy working with a liability insurance specialist and provide these prototype policies to all Public Law 93-638 contractors/grantees.
- (5) If it is determined that FTCA coverage is no longer required, we recommend that BIA develop proposed legislation that would rescind FTCA coverage for Public Law 93-638 grantees/contractors.

Executive Summary

Introduction

This study examines issues surrounding tribal experiences with private liability insurance and the Federal Tort Claims Act (FTCA). The primary purposes of the study are: (1) to examine access to private liability insurance by tribes and tribal organizations operating programs under the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638, and the coordination of that insurance with the immunity from tort liability for self-determination contractors and compactors and their employees provided under the FTCA; (2) to identify barriers to the appropriate pricing of private liability insurance; and (3) to recommend strategies that will assist tribes, tribal organizations, and other contractors and self-governance compactors to reduce the need for private liability insurance, as well as its cost.

Findings

The principal findings of the study are as follows:

1. The immunity from tort liability provided by the FTCA can be very beneficial for tribes and tribal organizations involved in P.L. 93-638 activities. Working with knowledgeable brokers, some tribes and tribal organizations report that they have been able to reduce their private liability insurance premiums substantially and, in some cases, completely drop certain types of coverage (e.g., medical malpractice) because of the FTCA.
2. Some tribes and tribal organizations involved in P.L. 93-638 contracting, however, may not have fully realized the benefits of the FTCA, because of the uncertainty, confusion, and lack of understanding among tribes, brokers, and insurance companies as to what activities are covered by the FTCA, when private sector coverage is unnecessary or duplicative, or how a FTCA claim proceeds through the system. This problem persists despite the publication of regulations under Title I of the Indian Self-Determination and Education Assistance Act Amendments ("1996 Regulations"), issued in June, 1996, which contain useful information about the FTCA for P.L. 93-638 contractors and compactors.

3. The difficulty that tribes and tribal organizations have in determining what private coverage they need to supplement their FTCA immunity may be compounded by what they describe as inconsistencies in how Federal personnel determine that particular claims are covered under the FTCA. Tribes, tribal organizations, and brokers report that there does not appear to be a uniformly applicable framework for coverage or a precedent-based decision-making system the results of which are available publicly. It is, therefore, hard for tribes, tribal organizations and insurers to judge the types of claims that might be covered under the FTCA and even harder to evaluate the extent to which private liability insurance is necessary or duplicative. This appears to be more of a problem with non-medical claims.
4. Notwithstanding the perception of self-determination contractors and brokers that there is no way to predict when the FTCA will apply to a particular tort claim because this decision requires a case-by-case analysis, a general framework for analysis of the FTCA's applicability to tort claims involving P.L. 93-638 contractors and their employees can be constructed that provides some assistance in assessing the likelihood that private liability insurance may be needed.
5. Tribes and tribal organizations report that the lines of communication between themselves and the Federal agencies involved in FTCA decision-making need to be improved. Tribes and tribal organizations report difficulties in determining a claim's status and resolution and receiving timely responses to tribal inquiries as to whether a claim will be covered or not by the FTCA.
6. Many insurance companies are unfamiliar with the FTCA and its applicability to self-determination contractors. Other insurers are uncertain about the reach of the FTCA and the process for filing an FTCA claim. As a result, some insurers may misconstrue, underestimate, or disregard the value of the FTCA in designing private liability insurance coverage for tribes and tribal organizations and in determining premiums to be charged for that insurance coverage. Because the level of sophistication about tribal tort immunity through the FTCA varies substantially, the number of insurers willing to write tribal coverage, while growing, is still relatively small. This is surprising because insurers routinely sell coverage to state and local governmental entities that have basic grants of immunity under statutes that are similar to the FTCA and therefore would have the same need as tribes for only supplementary private insurance coverage.

Recommendations

The principal recommendations of the study are as follows:

1. A clearinghouse could be created through which tribes and tribal organizations could share information about their experiences with the

purchase of private liability insurance. In addition, to facilitate networking among tribes, a web page could be created. The web page could include general information on the FTCA and list the designated regional contact people within the responsible agencies who can be contacted for more specific assistance.

2. The Secretaries of Health and Human Services and the Interior, in conjunction with the Department of Justice, could conduct informational meetings in various regions to acquaint tribes, tribal organizations, brokers and insurance companies with the basic principles of immunity from tort liability provided for self-determination contractors under the FTCA. The purpose of these meetings would be: (a) to assist tribal self-determination contractors to better understand the immunity from tort liability provided under the FTCA in order to improve their ability to purchase non-duplicative private liability insurance; and (b) to assist brokers and insurance companies to develop appropriate insurance products.
3. Informational materials could be developed for distribution to P.L. 93-638 contractors. These materials should be written in clear and understandable layperson's language. They would generally describe the immunity provided to self-determination contractors under the FTCA and identify (to the extent possible) the types of activities that may not be protected so as to assist tribes in understanding the extent to which they may need supplemental private liability insurance. These materials could be used by the tribes to share with brokers and representatives of insurance companies who are unfamiliar with the FTCA. The *Handbook for Tribes on How to Reduce Private Liability Insurance Costs* (which is part of this report) and the 1996 Regulations could serve as starting points. To maximize the usefulness of these materials for tribes in their negotiations with insurance companies, any guidance should be issued by the Federal government, since privately issued materials on the FTCA may be perceived as less authoritative.
4. Principles for determining more clearly when private liability insurance duplicates tribal FTCA immunity could be developed and communicated to all P.L. 93-638 contractors and compactors. In addition, examples of insurance contract language that does not duplicate the FTCA could be identified and shared with and among tribes, tribal organizations, brokers, insurance companies, and the Federal government.
5. If they have not yet done so, tribes and other P.L. 93-638 contractors and compactors should designate a tribal tort claims liaison with the Federal agencies for purposes of the FTCA, as the 1996 Regulations instruct. Similarly, the agencies should provide the tribal contractors with a list of key

regional contact persons who can act as resources for the tribal contractors on FTCA matters.

6. Misunderstandings and confusion about FTCA could be reduced by improving communications between self-determination contractors and Federal agencies.
7. More consistent interpretation and application of policies and procedures within and across Federal agencies would reduce confusion about FTCA issues. For instance, consideration could be given to developing consistent internal agency procedures for determining whether a claim will be covered under the FTCA. In addition, agencies could develop standardized responses to tribes that request information about the FTCA from the government. They also could develop a "to-whom-it-may-concern" letter verifying and explaining FTCA coverage of P.L. 93-638 activities, which could be used by the tribes when dealing with brokers, insurance companies, and other entities that require verification of FTCA coverage.
8. To the extent possible, a body of general information about claims filed under the FTCA could be developed. An on-line claims registry could be organized by type, location and disposition of claim. This registry would be for internal agency use to facilitate consistency in interpreting the FTCA.
9. Consideration could be given to the creation of a publicly available data base containing the same type of information as would be in the claims registry but, if necessary to maintain confidentiality, available without tribal or individual identifying information.
10. The Federal agencies could consider issuing additional clarification on FTCA coverage of certain activities which have been the source of particular confusion for tribal contractors, such as employment-related torts.

Conclusions

After a number of years in which tribes and tribal organizations experienced difficulty in finding private liability carriers willing to insure them at all, let alone at a reasonable prices, today's marketplace offers both opportunities and challenges. Some tribes have leverage to negotiate lower rates, and they have choices of insurers. They often have more than one carrier vying for their business, as the wide variety of enterprises in which the tribes are engaged are attractive sources of

income to insurance companies.

The grant of immunity from tort claims provided under the FTCA for P.L. 93-638 activities should have resulted in tribes and tribal organizations paying less for private insurance. However, a lack of awareness of the applicability of the FTCA and/or a full understanding of its scope appear to have prevented some tribes from doing so. One of the most important steps that tribes can take to lower their private liability costs is to become better informed about the fundamentals of the FTCA and the kind of commercial insurance they need to supplement the immunity from tort claims that the FTCA provides self-determination contractors and compactors and their employees. Once they become more educated consumers, tribes can use that information to negotiate more effectively with brokers and insurance companies. Among the tribes in our study were some whose understanding of the FTCA enabled them to purchase cheaper private liability insurance that does not duplicate the coverage already provided under the FTCA. Knowledgeable brokers have worked closely with some tribes and tribal organizations to develop insurance products that meet those tribes' needs and significantly reduce their private insurance costs.

The Federal government can help tribes and tribal organizations by providing more accessible information about the FTCA in a form that is simple and useful to laypersons. Tribes and tribal organizations can help each other by sharing information about their experiences in obtaining appropriate and reasonably priced insurance.

ADVISORY GROUP MEMBERS

Irene Auginaush-Turney
White Earth Nation

Marla Bigboy
Attorney at Law

Deborah A. Broken Rope
Indian Health Service

Dennis Chappabitty
Attorney at Law

Ray Cook
St. Regis Mohawk Tribe MATSC

James F. Coyle
Public Risk Mgmt Association

Mark Curry
Tohono O'Odham Nation

Eric R. Davenport
Sedgwick of WA, Inc.

P. Sam Deloria
American Indian Law Center

John Dossett
National Congress of American Indians

Thomas W. Fredericks
Fredericks, Pelcyger Hesler & White LLC

Robert Gauthier
Amerind Risk Mgmt Corp

Stephen Gordon
Native American Insurance Agency

Charles Gourd
Cherokee Nation

Anita Greenwood
First American Insurance Service

Charleen H. Greer
Salt River Pima Maricopa Indian Community

Robert Hallameck
Program for Sovereign Indian Nations

William J. Henderks
The St. Paul Fire and Marine Insurance Co.

Ralph C. Honhongva
Honhongva Associates

Allen F. Hyman
J & H Marsh & McLennan, Inc.

Matthew S. Jaffee
Hobbs Straus Dean & Walker LLP

Jackson T. King, Jr.
Mashantucket Pequot Tribal Nation

Miles King
Redding Rancheria

Linda L. Lyons
Leech Lake Tribal Council

Ben Manuelito
DLA Insurance Company

Carla J. Nicholas
The Pace Companies

R. Sean McConlogue
Tristar Insurance Services

Chris E. McNeil, Jr.
Mashantucket Pequot Tribal Nation

David M. Parker, ARM
Pima County - Risk Mgmt Dept

Kent E. Paul, ARM
Amerind Risk Mgmt Corp

Bryant Rogers

Ramos J. Romero, Governor
Pueblo of Tesuque

David F. Shorty, Jr.
Navajo Nation

Laura Soap
Kickapoo Tribe Gaming Commission

Lawrence Snake
Delaware Tribe of Western OK

Carl Tsosie, Jr.
Northern Pueblos Housing Authority

Carson Rodger Vincenti
The Jicarilla Apache Tribe

INDIAN TRIBAL TORT CLAIMS AND RISK MANAGEMENT ACT OF 1998

1999 TRIBAL SURVEY

TRIBE: _____

Name of Individual Filling Out This Form: _____

Your street address: _____ **City:** _____

State: _____ **Zip:** _____ **Telephone:** _____

LIST other tribal and non-tribal sources that assisted you in completing this survey: _____

Name of tribe's insurance broker/agent: _____

His/Her street address: _____

City: _____ **State:** _____ **Zip:** _____ **Tel:** _____

LIST effective dates of coverage(s): _____

#	SURVEY QUESTIONS (use additional sheets, if necessary)	YES	N
1a	Does your tribe have insurance coverage for governmental activities? (Check Yes or No)		
1b	If no, please explain:		
2a	Is your Tribe engaged in gaming activity?		
2b	If yes, does the gaming operation carry insurance coverage separate from other tribal government activity?		
3a	Are you willing to provide a copy of the cover sheet of your tribe's insurance policy(ies)?		
3b	If yes, please attach to this survey a copy of the insurance policy cover sheet.		
4a	Do any of your tribe's insurance policies contain endorsements or clauses that address how the defense of sovereign immunity will be handled with claims made under the policies?		
4b	If yes, please explain the circumstances in which that defense may or shall be raised. Also, please indicate who makes the decision to raise the defense.		
	Attach a copy of applicable policy clauses and/or endorsements.		
5a	Do any of your tribe's insurance policies contain clauses or endorsements that address how the insurance coverage relates to claims covered by the Federal Tort Claims Act?		
5b	If yes, please attach examples of such clauses and/or endorsements.		

ANALYSIS OF LOSS DATA

3 Year History

	Number of Claims	Number of Claims Paid	Number of Claims Denied/Unpaid
General Liability			
Auto Liability			
Law Enforcement Liability			
Workers' Compensation			
Other Liability			

PAID CLAIMS

	Number of Claims Paid	Total Amount Paid	Total Amount of Exposure or Loss
General Liability			
Auto Liability			
Law Enforcement Liability			
Workers' Compensation			
Other Liability			

DENIED / UNPAID/REFERRED CLAIMS

	Number of Claims	No Negligence	Excluded From Coverage	Sovereign Immunity Defense	Statute of Limitations	Jurisdictional Bar
General Liability						
Auto Liability						
Law Enforcement Liability						
Workers' Compensation						
Other Liability						

INSURANCE COVERAGE ASSESSMENT

Insurance Coverages Available	Coverage Provided by Policy	Coverage Provided by FTCA	Occurrence Limit
General Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Employer Benefit Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Employment Practices Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Automobile Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Tribal Officials Errors and Omissions	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Directors & Officers Errors and Omissions	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Police Professional Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Other Professional Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
EMTs	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Umbrella Liability	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Workers' Compensation	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	
Other Liability - please identify:	yes <input type="checkbox"/> no <input type="checkbox"/>	yes <input type="checkbox"/> no <input type="checkbox"/>	

RISK ASSESSMENT

PROJECTED EXPOSURE TO LIABILITY

Please list those tribal programs which
are funded by PL-638 or self-governance
compacts

Please list those tribal economic enterprises
funded by the Tribe

--	--